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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

JOSE BARCENAS et al.,

Plaintiffs and Appellants

v.

99 CENTS ONLY STORES, LLC,

Defendant and Respondent.

B316898

Los Angeles County

Super. Ct. No.

20STCV44507

APPEAL from an order of the Superior Court of Los Angeles County, Steven J. Kleifield, Judge. Affirmed.

Law Offices of Jack D. Josephson, Jack D. Josephson; and Joseph S. Socher for Plaintiffs and Appellants.

Akerman, Michael L. Gallion and David Van Pelt for Defendant and Respondent.

INTRODUCTION

Plaintiffs Jose Barcenas and Mirna Hernandez sued defendant 99 Cents Only Stores, LLC (99 Cents or the store) for various wage and hour claims. 99 Cents successfully moved to compel arbitration of plaintiffs' claims and, per a provision in the parties' arbitration agreement, the trial court awarded the store more than \$6,000 in attorney fees and costs associated with prosecuting the motion to compel arbitration (fees award). Plaintiffs appeal, challenging only the fees award. Because they never opposed 99 Cents' request for attorney fees and costs or otherwise objected to the fees award below, plaintiffs have forfeited their only claim on appeal. We therefore affirm.

BACKGROUND

In November 2020, plaintiffs sued 99 Cents for various wage and hour claims arising out of their employment with the store. Plaintiffs alleged, among other things, that the store failed to provide them mandatory breaks and pay them for time that they worked "off-the-clock."

In April 2021, counsel for 99 Cents sent plaintiffs' counsel an email stating that plaintiffs' claims were subject to a binding arbitration agreement and asking whether plaintiffs had "reevaluated their position" on pursuing their claims in court. 99 Cents' counsel also informed plaintiffs' counsel that, under the arbitration agreement, the store would be "entitled to attorney fees" should the store have to file a motion to compel arbitration.

Plaintiffs' counsel responded that plaintiffs "are not amenable to stipulating to arbitration" because they believed the arbitration agreement was unconscionable. Plaintiffs' counsel also warned that "[s]eeking attorney fees ... will force [plaintiffs]

to take all settlement negotiations off the table and any demand would accordingly be higher.”

On June 16, 2021, 99 Cents’ counsel sent plaintiffs’ counsel another email asking if plaintiffs were willing to stipulate to arbitration. 99 Cents’ counsel indicated the store would file a motion to compel arbitration and seek attorney fees and costs unless plaintiffs agreed to arbitrate their claims.

On June 22, 2021, 99 Cents moved to compel arbitration of plaintiffs’ claims. The store argued that plaintiffs signed a binding arbitration agreement when they were hired. In the last section of its memorandum of points and authorities attached to the motion, 99 Cents asked the court to award the store attorney fees and costs for seeking an order to compel arbitration, citing a provision in the arbitration agreement providing for such an award to any party that successfully moves to compel arbitration of the other party’s claims.

99 Cents’ notice of motion didn’t mention the store’s request for attorney fees and costs. The notice of motion stated, however, that 99 Cents’ motion was based upon the “notice, the memorandum of points and authorities filed currently herewith, the declarations of Ashley N. Bobo and Cathy Harris filed concurrently herewith, the pleadings on file, and such evidence and argument as may be presented at the hearing on this motion.”

Although 99 Cents store’s motion to compel arbitration didn’t specify the amount of fees and costs that the store was requesting, counsel filed a declaration and billing documents in support of the motion, detailing her hourly rates and the amount of time she spent working on the motion to compel arbitration.

Counsel claimed the store had incurred \$3,861.65 in attorney fees and costs associated with researching and drafting the motion.

Plaintiffs filed an opposition to 99 Cents' motion to compel arbitration. Plaintiffs argued the parties never agreed to arbitrate their disputes and, even if they did, the arbitration agreement was unconscionable and, therefore, unenforceable. Plaintiffs did not address 99 Cents' request for attorney fees and costs.

99 Cents filed a reply, in which it asked the court to award the store \$6,759.65 in attorney fees and costs, consisting of \$3,861.65 for the store's initial moving papers plus \$2,898 for the reply papers.

Following an unreported hearing at which both sides argued,¹ the court granted 99 Cents' motion to compel arbitration and awarded the store \$6,759.65 as "[s]anctions" against plaintiffs, jointly and severally.

Plaintiffs appeal.

DISCUSSION

Plaintiffs contend the court erred when it issued the fees award. According to plaintiffs, the award is inconsistent with public policy, amounts to an unauthorized sanction, and was issued without proper notice. As we explain, because plaintiffs never opposed 99 Cents' request for attorney fees and costs or

¹ There is no reporter's transcript from this hearing. Although the record includes a settled statement from the hearing, that document does not include any information describing what arguments, if any, plaintiffs raised in opposition to 99 Cents' request for an award of attorney fees and costs.

objected to the fees award below, they have forfeited any challenge to that award on appeal.²

The most fundamental rule of appellate procedure is that an order or judgment challenged on appeal is presumed correct, and it is the appellant's burden to demonstrate error. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655–656.) To meet this burden, the appellant must provide an adequate appellate record. “Failure to provide an adequate record on an issue requires that the issue be resolved against” the appellant. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

An appellant must also first raise a claim in the trial court before raising it on appeal. (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167.) Appellate courts generally will not reverse for errors that could have been, but were not, challenged below. (*Choochagi v. Barracuda Networks, Inc.* (2020) 60 Cal.App.5th 444, 468–469.) Thus, an appellant's failure “to register a proper and timely objection to a ruling or proceeding in the trial court waives the issue on appeal.” (*Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1602; see

² Although the store did not raise the forfeiture issue and instead responded to plaintiffs' arguments on the merits, we may still find the issue forfeited. (*S.M. v. Los Angeles Unified School Dist.* (2010) 184 Cal.App.4th 712, 722 [deeming issue waived even though respondent had addressed issue on the merits].) Since the assertion of an issue in the trial court is generally required to preserve the claim for appeal, we may affirm on the ground of forfeiture even though the parties have not briefed the forfeiture question. (See *People v. Neilson* (2007) 154 Cal.App.4th 1529, 1534 [provision of adequate record on appeal is “a procedural and substantive requirement on the part of any party ... asserting a position on appeal” and thus Government Code section 68081 does not require briefing of issue of inadequate record].)

also *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184–185, fn. 1 [“ ‘it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected [below]’ ”].)

Here, plaintiffs had plenty of opportunities to object to 99 Cents’ request for attorney fees and costs. They could have addressed that request in their opposition to 99 Cents’ motion to compel arbitration, but they didn’t. They also could have opposed the store’s request at the hearing on the arbitration motion or objected to the court’s ruling awarding the store attorney fees and costs, but nothing in the record suggests that they did. As we noted above, the appellate record doesn’t include a reporter’s transcript from the hearing on 99 Cents’ arbitration motion, and the settled statement included in the record doesn’t reflect what arguments, if any, plaintiffs raised at that hearing. Because plaintiffs haven’t shown they opposed 99 Cents’ request for attorney fees and costs or objected to the court’s fees award, they have forfeited any challenge on appeal to that award. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296 [because appellants “failed to furnish an adequate record of the attorney fee proceedings, [their] claim must be resolved against them”].)

Plaintiffs contend they didn’t have sufficient notice that the court could award 99 Cents attorney fees and costs because neither the store’s notice of motion nor the motion’s caption page referenced the store’s request for a fees award. This argument is meritless.

Where a notice of motion fails to state a particular ground for the motion, that defect should be disregarded if the notice states that it “is being made upon the notice of motion and accompanying papers and the record, and these papers and the

record support that particular ground.” (*Carrasco v. Craft* (1985) 164 Cal.App.3d 796, 808 (*Carrasco*).) Additionally, a party may waive an appellate challenge to a defective notice of motion by failing to object to that defect below. (*Fredrickson v. Superior Court* (1952) 38 Cal.2d 593, 598 (*Fredrickson*).)

As we noted above, 99 Cents’ notice of motion states that the store’s motion to compel arbitration was based on the notice as well as the accompanying memorandum of points and authorities, declarations submitted by 99 Cents’ counsel, and any evidence and argument that may be presented at the hearing on the motion. 99 Cents’ memorandum of points and authorities included a request for attorney fees and costs, and one of the attached declarations submitted by the store’s counsel detailed the amount of fees and costs the store incurred in connection with the initial moving papers. Moreover, before filing the motion to compel arbitration, 99 Cents’ counsel sent two emails notifying plaintiffs’ counsel that the store intended to make a request for fees and costs as part of its motion. Plaintiffs, therefore, had ample notice that 99 Cents was seeking an award of attorney fees and costs. (See *Carrasco, supra*, 164 Cal.App.3d at p. 808.) In any event, because plaintiffs never objected below to 99 Cents’ notice of motion, they have forfeited any challenge on appeal based on any defects in that notice. (*Fredrickson, supra*, 38 Cal.2d at p. 598.)

Plaintiffs also claim they lacked notice of the amount of fees and costs requested by 99 Cents because the store didn’t specify an amount in its initial moving papers. We have several responses to this argument. First, plaintiffs have forfeited any challenge to the amount of fees and costs requested by 99 Cents because they never raised that issue below. (*In re Marriage of*

Feldman (2007) 153 Cal.App.4th 1470, 1496 [failure to object in the trial court to amount of fees sought or to the sufficiency of the documentation submitted in support of attorney fees forfeits right to challenge amount of award on appeal].) Second, although 99 Cents' notice of motion and supporting memorandum of points and authorities didn't specify the amount of fees and costs the store sought, the store's counsel submitted a declaration in support of the motion to compel arbitration that detailed the amount of fees and costs the store incurred in connection with the initial moving papers. Likewise, 99 Cents specified in its reply and the documents submitted in support of its reply the total amount of fees and costs the store sought for prosecuting its motion to compel arbitration. Thus, plaintiffs had actual notice of the amount of fees and costs 99 Cents sought to recover.

In short, because plaintiffs never opposed 99 Cents' request for attorney fees and costs or objected to the amount sought by the store, they have forfeited any challenge to that award on appeal.

DISPOSITION

The order granting 99 Cents' motion to compel arbitration is affirmed. 99 Cents shall recover its costs on appeal.

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LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

NGUYEN, (KIM) J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.